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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

BONNIE MOORE, ACCOUNTING CENTER, and
CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS,
Petitioners,
vs.
CALIFORNIA STATE BOARD OF ACCOUNTANCY,
Respondent.

Petition for a Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with First Amendment protections for commercial speech, individuals permitted by law to perform basic accounting services without being licensed can be prohibited from using the generic terms "accountant" or "accounting."

2. Whether constitutional rights of free speech and due process protections essential to the enjoyment of those rights are violated by an appellate court's *sua sponte* decree forcing non-licensed accountants to accompany any use of the generic terms "accountant" or "accounting" with a mandatory disclaimer of licensed status, despite the fact that no statute or regulation authorizes such disclaimers and there was no evidence presented concerning the propriety or consequences of the disclaimer mandated by the appellate court, because both sides in the underlying action concurred that any remedy involving mandatory disclaimers would be inappropriate and unwise.

3. Whether constitutional due process standards are violated by a regulation which serves the economic self-interest of members on a licensee-controlled State Board by restricting the freedom of non-licensees to advertise or perform the services they offer in lawful competition with licensees.

LIST OF ALL PARTIES

Petitioners were plaintiffs and appellants in the proceedings below. BONNIE MOORE is a college graduate with an accounting major who has never sought licensure as a certified public accountant. Instead, she has provided customers with the basic accounting services which non-licensed individuals may offer under California law, both as an individual and as the principal owner of ACCOUNTING CENTER, a California corporation. The CALIFORNIA ASSOCIATION OF INDEPENDENT ACCOUNTANTS ("CAIA") is a non-profit association. Its membership includes both licensed and non-licensed accountants practicing in California.

Respondent is the CALIFORNIA STATE BOARD OF ACCOUNTANCY ("State Board"), a state agency with authority to license and regulate certified public accountants and to otherwise administer the California Accountancy Act. (Calif. Bus. & Prof. Code §§ 5000 et seq.)

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OPINIONS BELOW

The 4-3 decision of the California Supreme Court issued on July 2, 1992 appears at 2 Cal.4th 999, and is reproduced (with dissenting opinions) beginning at Appendix page 1. A petition for rehearing was filed by Petitioners herein and was denied on August 27, 1992. The order denying the petition for rehearing is reproduced in the Appendix at page 43.

The decision of the intermediate California Court of Appeal, issued August 1, 1990, is reproduced beginning at Appendix page 44. An August 29, 1990 order of that court denying petitions for rehearing filed by *both sides* and amending its original opinion, is reproduced beginning at Appendix page 55.

The unreported Statement of Decision issued by the San Francisco Superior Court on March 16, 1989 is reproduced beginning at Appendix page 57.

JURISDICTION

The decision of the California Supreme Court was rendered on July 2, 1992. A timely petition for rehearing was denied on August 27, 1992. This Petition for Writ of Certiorari is filed within 90 days of the order denying the petition for rehearing. This Court has jurisdiction to review the decision of the California Supreme Court under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are involved in this case:

1. First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fourteenth Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

3. Section 5052, California Business and Professions Code:

> "Nothing in this chapter shall apply to any person who as an employee, independent contractor, or otherwise, contracts with one or more persons, organizations, or entities, for the

purpose of keeping books, making trial balances, statements, making audits or preparing reports, all as a part of bookkeeping operations, provided that such trial balances, statements, or reports are not issued over the name of such person as having been prepared or examined by a certified public accountant or public accountant.

Nothing contained in this chapter shall affect, limit or be construed as affecting or limiting the rights of any public accountant who met the requirements of prior statutes and who was registered with the board as a public accountant on or before December 31, 1955."

4. Section 5058, California Business and Professions Code:

"No person or partnership shall assume or use the title or designation 'chartered accountant,' 'certified accountant,' 'enrolled accountant,' 'registered accountant,' or 'licensed accountant,' or any other title or designation likely to be confused with 'certified public accountant' or 'public accountant,' or any of the abbreviations 'C.A.,' 'E.A.,' 'R.A.,' or 'L.A.,' or similar abbreviations likely to be confused with 'C.P.A.' or 'P.A.'; provided, that any person qualified as a certified public accountant under this chapter who also holds a comparable title granted under the laws of another country may use such title in conjunction with the title of 'certified public accountant' or 'C.P.A.' and provided, that any person enrolled to practice before the Internal Revenue Service and recognized as an enrolled agent may use the abbreviation 'E.A.' "

5. California Administrative Code, Title 16, Chapter 1, Article 1, Regulation 2:

"The following are titles or designations likely to be confused with the titles Certified Public Accountant and Public Accountant within the meaning of section 5058 of the Business and Professions Code: (a) 'Accountant,' 'auditor,' 'accounting,' or 'auditing' when used either singularly or collectively or in conjunction with other titles. (b) Any other titles or designations which imply that the individual is engaged in the practice of public accountancy."

STATEMENT OF THE CASE

At stake in this case is the freedom of men and women who are permitted by law to perform basic accounting services for the general public, to advertise and practice effectively by using the generic terms which most accurately describe their status and the services they offer. Petitioners initiated this action to challenge a regulation of the California State Board of Accountancy which barred non-licensed accountants from all uses of the generic terms "accountant" and "accounting." The trial court upheld the State Board's regulation without limitation.

The intermediate California Court of Appeal agreed with petitioners that the State Board's absolute ban upon use of the generic terms could not be squared with this Court's decisions extending First Amendment protections to commercial speech. Rather than declaring the regulation invalid, however, the Court of Appeal announced a new restraint of its own invention by holding that every use of the generic terms by non-licensed persons must be accompanied by a mandatory disclaimer stating that the user is "unlicensed," or that the services offered do not require a license. Both sides filed petitions for rehearing on the grounds that the Court of Appeal's *sua sponte* disclaimer requirement was inconsistent with the State Board's regulation, unsupported by any evidence in the trial record, and unwise. Indeed, the trial court specifically found that "[R]equiring unlicensed persons to include negative disclaimer language in their advertising (e.g., 'not licensed by the Board of Accountancy') would create its own species of confusion for consumers and *is not viewed as acceptable by either of the parties to this litigation.*" (Appendix pp. 63-64.) (Emphasis added.)

Despite the irreconcilable conflict between its ruling and the record, the Court of Appeal denied both petitions for rehearing. The California Supreme Court subsequently affirmed the decision of the Court of Appeal by a 4-3 vote.

The constitutional issues posed by this petition were raised in the courts below. The complaint filed in 1986 challenged the State Board's regulation on First Amendment grounds:

> "15. Use of the generic terms 'accountant' and 'accounting' by plaintiffs and the members of the CAIA is a form of commercial speech which is protected by the First Amendment of the United States Constitution and by the Constitution of the State of California. In order to constitutionally regulate said commercial speech, the BOARD must comply with the constitutional requirements set forth by the United States Supreme Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission* 447 U.S. 557, 564, 65 L.Ed.2d 341 (1980) and its progeny. The BOARD's cease and desist orders against BONNIE MOORE and various CAIA members do not satisfy such constitutional requirements." (Complaint for Declaratory Relief and Permanent Injunction, dated 8/21/86 at p. 7.)

A Petition for Review filed with the California Supreme Court added due process objections addressing the Court of Appeal's *sua sponte* disclaimer requirement:

> "In summary, a court may only deal with the issues presented by the parties, and it is limited as well as by its constitutional role in passing upon the validity of statutes or regulations of administrative bodies created by the legislature. The courts can determine whether a given statute or regulation is valid or invalid, but they cannot rewrite the statute or regulation to save it from invalidity by limiting its scope in a manner inconsistent with its terms. A court may express the view that a more limited regulation would satisfy constitutional standards, but it cannot enter an injunction as if that more limited regulation had already been promulgated." (Petition for Review dated 9/10/90, at p. 17.)

An amicus brief filed by the California Center for Public Interest Law raised additional due process issues based upon the State Board's promulgation of regulations advancing the economic self-interest of its licensee members:

> "Additionally, CPIL urges this Honorable Court to recognize the following significant due process issue: where a rulemaking and adjudicatory body consists primarily of licensees belonging to a specific economic grouping (*e.g.*, one type of accountant) in competition with other similar practitioners, is it constitutional for those board members to use the power of the State to adopt and enforce rules of practice to their economic advantage against groups not represented in the relevant tribunal?" (Brief of Amicus Curiae Center for Public Interest Law dated 1/11/91, at p. 4.)

Both California appellate courts agreed that the State Board's blanket prohibition upon all uses of the generic terms could not satisfy First Amendment standards, because use of those terms by non-licensees was truthful and neither inherently, nor actually, misleading. (See Appendix pp. 22-27, and 51-52.) However, both courts erred by rewriting the regulation *sua sponte* to place new restraints upon use of the generic terms without any statutory or evidentiary basis. The senior justice of the California Supreme Court dissented from that result on First Amendment grounds. (See dissent of Mosk, J. at Appendix pp. 29-32.) Justice Mosk also expressed doubt that promulgation of such a clearly anti-competitive regulation by a licensee-dominated State agency could satisfy due process standards. (Ibid.) The majority opinion did not address the due process arguments advanced by petitioners or amicus.

The California Supreme Court has decided important issues of federal constitutional law in direct conflict with decisions of this Court. Its decision also conflicts with that of Maryland's court of last resort which invalidated an identical restraint, reserving to licensed accountants exclusive use of the same generic terms. *Comprehensive Accounting Service Co.* v. *Maryland State Board of Accounting* (Md. 1979) 397 A.2d 1019. ("*Comprehensive*").

Unless reviewed and corrected by this Court, the erroneous ruling of the California Supreme Court will violate the free speech rights of non-licensed accountants throughout California and will deprive all California citizens and businesses of the benefits they would enjoy if non-licensed accountants were free to advertise their lawful services effectively in competition with licensees. Unless review is granted, there is a substantial risk that other state and federal courts will perceive this decision by the highest court of the most populous state as authorizing the exercise of a new judicial power in dealing with unconstitutional restraints upon commercial speech — the power to impose *sua sponte* legislative solutions in such cases, even to the point of requiring mandatory disclaimers which are opposed by all parties and lack any statutory or evidentiary basis.

It has been less than twenty years since this Court extended First Amendment protections to commercial speech. *Virginia Pharmacy Board* v. *Virginia Consumer Council* (1975) 425 U.S. 748. Continued development of reasonable rules in this embryonic area of constitutional law requires careful review to ensure that a decision of a highly visible state court does not introduce new principles which will weaken the protections established by this Court for all commercial speech.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER STATE COURTS OF LAST RESORT

The California Supreme Court addressed a regulation which, by its express language and the consistent interpretation of the promulgating agency, reserved to licensees of the State Board exclusive use of the generic terms "accountant" or "accounting." All other accounting practitioners were thereby faced with this anomaly: They were specifically permitted by California law to prepare financial reports and perform other basic accounting services, but they could not call themselves "accountants" and

could not use the word "accounting" in reports prepared for clients (for example, by referring to "generally accepted *accounting* principles").

Every justice of the California Supreme Court agreed that the generic terms are truthful and accurate in describing the services performed by non-licensed persons under California Business & Professions Code section 5052 and in identifying those who perform such services. Justice Mosk said it most succinctly: ". . . it is axiomatic that those who perform accounting are accountants." (Dissenting Opinion at Appendix p. 29.)

Because the State could not satisfy its burden of proving that use of the generic terms was either inherently or actually misleading, a majority of the California Supreme Court held that the State Board's *absolute* prohibition upon use of those terms was unconstitutional. (See Appendix pp. 22-27.) That holding correctly applied principles enunciated by this Court for the protection of commercial speech. It also duplicated the *Comprehensive* ruling of Maryland's highest court, which declared invalid an identical prohibition against use of the generic terms by non-licensed accountants performing basic accounting services under Maryland law. However, the California Supreme Court did not rest with its finding that the State Board's absolute prohibition was unconstitutional. Instead, the majority turned to dicta from the *Comprehensive* opinion and various decisions of this Court suggesting that where commercial speech is potentially misleading, alternative forms of regulation less restrictive than an absolute prohibition (such as mandatory disclaimer requirements) *may* be constitutional. From that dicta, the majority mistakenly assumed that it had the power to fashion its own disclaimer remedy, *sua sponte*. That is where the majority erred. It failed to recognize that an essential underpinning of the constitutional protections afforded commercial speech is a requirement that the State satisfy a heavy burden of proof to justify *any* restraint — whether absolute or qualified.[1]

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[1]See, *e.g., In Re R.M.J.* (1982) 455 U.S. 191, at 200 n. 11 (State must justify restriction in light of "experience"); *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n* (1980) 447 U.S. 557, 570; *Bates*

Perforce, the State cannot satisfy its burden of proof to justify a mandatory disclaimer requirement where no evidence at all is offered concerning such a requirement. In fact, the State took the position in this case that the particular disclaimer requirement imposed by the appellate courts (mandating use of the term "unlicensed accountant") was inappropriate and would only serve to *increase* the risk that consumers would be misled.[2] In its Petition for Rehearing in the Court of Appeal, as well as its brief filed with the California Supreme Court, the State Board identified a series of problems inherent in replacing its absolute ban upon all uses of the generic terms with a requirement that non-licensed accountants add disclaimers or modifiers to any use of those terms. Among the problems which the State Board identified were:

1.) that "there is an obvious confusion inherent in the term 'unlicensed accountant . . . .' " (Respondent's Brief on the Merits in the Supreme Court at p. 43);

2.) any court approval of disclaimer language would open "a 'Pandora's box' of potential confusion by inviting unlicensed persons to test the limits of the state's regulatory authority and the boundaries of public confusion" (Ibid.); and

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v. *State Bar of Arizona* (1977) 433 U.S. 350, 381; *Linmark Associates, Inc.* v. *Township of Willingboro* (1977) 431 U.S. 85, 95 ("the record here demonstrates that respondents failed to establish that [their restriction] is needed"); and *Virginia Pharmacy Board* v. *Virginia Consumer Council*, cited *supra*, 425 U.S. at p. 769 (Commonwealth's justifications failed on "close inspection"). Affirmative disclosure requirements are subject to the same First Amendment protections. Therefore, the State bears the burden of establishing that any disclosure requirement is "reasonably related to the State's interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel* (1985) 471 U.S. 626, 652.

[2]Petitioners agreed with this assessment. Hence, neither party had any reason (or opportunity) to offer evidence at trial on the impact or advisability of mandatory disclaimers.

3.) a specific disclaimer stating that certain services do not require a state license "is even more potentially confusing . . ." than no disclaimer at all (*Ibid.*, p. 44.).

The only record evidence which bears upon the potential impact of a mandatory disclaimer requirement reinforces the concerns raised by the State Board. In its discussion of the evidence, the majority opinion refers to a survey commissioned by the State Board in which over 50% of the Californians who were polled expressed a belief that anyone advertising accounting services to the public was legally required to be licensed before offering those services. (See Appendix at pp. 5-6.) The dissenting opinions cite the dangers of using opinion polls as a substitute for direct evidence and identify the deficiencies of this particular survey. However, if it has any weight and relevance, the survey evidence in this record only serves to illustrate the potentially disastrous consequences of the court-imposed mandatory disclaimer, both in creating greater public confusion and impairing the rights of non-licensed persons effectively to advertise their lawful services. If a majority of Californians believe that anyone using the term "accountant," or advertising "accounting services," must first be licensed by the State, then use of the term "unlicensed accountant" can only be regarded by that majority as an oxymoron — and possibly an admission that the user is offering accounting services illegally, because they do not have a license. The inevitable result is more, not less, public confusion and misunderstanding.[3]

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[3]A number of states specifically authorize non-licensees to use the generic terms accountant or accounting, apparently without encountering any significant problem of public confusion between accountants who are licensed or "certified" and those who are not. *E.g.*, Illinois Professions and Occupations Code, § 5534, ¶28(e); Nebraska Revised Statutes, § 1-164.03 and Washington Revised Codes, § 18.04.345(3). Many states have general statutory prohibitions against use of the title "certified public accountant" or any other title suggesting that the user is licensed by the state where that is not true, but none of those states has yet interpreted such a statute to bring the unadorned term "accountant" within its general proscription. *E.g.*, Alaska Statutes, § 08.04.540; Arizona Revised Statutes, § 32-747; Colorado Revised Statutes, § 12-2-

The California Supreme Court's decision is in conflict with the recent decision of this Court in *Peel* v. *Attorney Disciplinary Comm'n of Ill.* (1990) 496 U.S. 91. The majority conceded in *Peel* that references to certification by a "national board of trial advocacy" might potentially mislead the public to believe that an attorney was certified by the State as a trial advocate. Nevertheless, it held that mere *potential* for confusion was insufficient to "satisfy the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public . . . ." (496 at p. 109.) The *Peel* opinion also contains dicta suggesting that the State might constitutionally adopt the less restrictive alternative of requiring a disclaimer concerning the certifying organization or its standards. (496 U.S. at p. 110.) However, the Court held Illinois' absolute prohibition invalid and left the Legislature or Bar of that state to decide what, if any, disclaimer requirement should be enacted. Maryland's highest court reached the same result in *Comprehensive.* But the majority opinion below *upheld* an identical prohibition by imposing a disclaimer condition which, if appropriate, could have been mandated as easily by this Court in *Peel*, or Maryland's highest court in *Comprehensive.*

Justice White argued in a dissenting opinion that this Court should have upheld the lower court's sanctions in *Peel* on the grounds that a disclaimer *might* constitutionally be required, and there was no disclaimer in plaintiff's professional advertisements. No other justice joined in that dissent, or voiced any support for

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115; 24 Delaware Code, § 106; Florida Statutes, § 473.322; Kansas Statutes Ann., § 1-316; Louisiana Revised Statutes, § 37:77; Maine Revised Statutes, § 12275; Minnesota Statutes, § 326.21; Mississippi Code Ann., § 73-33-13; New York Consolidated Laws, Education § 7408; North Carolina General Statutes, § 93-3; Wisconsin Statutes, § 442.11; and Wyoming Statutes, § 33-3-126. Finally, a number of state courts besides Maryland have held that use of the generic terms accountant or accounting cannot be reserved exclusively for licensees. (See cases cited in Mosk Dissenting Opinion at Appendix p. 30.) Thus, a significant number of states either reject or fail to recognize the potential problem of public confusion (over the status of unlicensed persons using the generic terms) which the California Supreme Court has reached so far to "solve" in this case.

such an approach. Apparently based upon Justice White's dissent in *Peel*, the California Supreme court has made an even more drastic departure from established commercial speech doctrine by assuming the power to fashion and impose its own disclaimer remedy, *sua sponte*, with the force and effect of new legislation.

The errors of the majority opinion and its conflict with decisions of this court may seem apparent. However, the fact that it carries the imprimatur of the highest court in California, coupled with the formative state of the law in this area, poses an unacceptable risk that it will be followed — not only by all courts in California, but by other state and federal courts as well. That risk is compounded by the fact that it is relatively easy for creative judges or counsel to imagine at least a *potential* for public confusion in virtually any commercial speech. It is equally easy to conceive some affirmative disclosure requirement to address any presumed public confusion. Yet if the approach of California's Supreme Court is adopted, it will undermine the entire constitutional edifice constructed by this Court to protect commercial speech. That construct requires the State in the first instance to give adequate notice of any restraint it proposes to place upon commercial speech, then to satisfy its burden of proving such a restraint is necessary and appropriate in a proceeding where the party whose speech is to be restrained has had an opportunity to be heard and present opposing evidence. Without those safeguards, the constitutional guarantee of freedom for commercial speech will become an illusion, subject to the whims of any appellate court too impatient to wait for legislative or regulatory action addressing what it perceives to be some risk of public confusion.

II.

THE DECISION OF THE CALIFORNIA SUPREME COURT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

Although the decision of the California Supreme Court is in direct conflict with the basic principles underlying all prior deci-

sions on commercial speech, this Court has never faced the specific question posed by the decision below — may an appellate court acting *sua sponte* fashion a less restrictive alternative limitation upon potentially misleading commercial speech in response to an unconstitutional absolute ban without any statutory basis and without giving the parties any opportunity to present evidence on the propriety of that new limitation? Unless certiorari is granted, the sole authority addressing that issue will be the majority opinion in this case. Only this Court can finally settle the important questions of federal constitutional law raised by that decision.

As noted in Justice Mosk's dissent, a handful of state courts have addressed the broader issue of whether non-licensed accountants have an absolute right to use the generic terms without qualification. All but one intermediate appellate court in Texas has upheld that right. (See Appendix, p. 30.) However, most of those cases are more than twenty years old. Therefore, only the *Comprehensive* case based its decision upon constitutional protections for commercial speech. In the vast majority of states where licensed and non-licensed accountants compete as providers of basic accounting services which do not require the specialized audit expertise of a CPA, licensee-dominated accountancy boards can be expected to take advantage of the decision below as an opportunity to shackle their competition with the confusing and demeaning epithet "unlicensed accountant." This Court cannot impose uniformity upon all state regulation of the accounting profession, but only this Court can ensure that the same principles are applied whenever State restraints upon professional advertising are tested against constitutional free speech standards.

The fact that the regulation at issue was promulgated by a licensee-dominated state agency bent upon curtailing competition from non-licensees raises another important federal question which should be settled by this Court. Justice Mosk addressed that issue in his dissent:

> "Furthermore, Regulation 2 is itself of questionable validity. In 1948, at the time it was adopted, the Board consisted entirely of licensed accountants. (Citation.) The membership of the Board . . . presently . . . consists of 12 persons, 8 of

> them accounting professionals licensed by the state, and 4 public members. (Citation.) None of the members of the Board . . . is an unlicensed person performing accounting work . . . . The Board majority has an obvious pecuniary interest in preventing those without a license from advertising to the public that they are performing accounting services. Regulation 2 furthers that interest. The law has long looked with disfavor on rules adopted by a regulatory body the majority of which consists of members of a profession with a pecuniary stake in restricting the rights of competitors. (Citations.)" (Appendix, p 31.)

In *Gibson* v. *Berryhill* (1973) 411 U.S. 564, this court held that the pecuniary self-interest of licensed optometrists on the Alabama Board of Optometry raised due process considerations which precluded them from initiating valid proceedings against competing optometrists. This Court should resolve any doubt about whether the due process principles applied in *Gibson* also preclude the licensee-dominated State Board of Accountancy from issuing a valid regulation aimed at restraining competition between licensees and non-licensees. It can do so by granting the petition for certiorari in this case, then reversing the California Supreme Court decision which upholds the State Board's regulation in modified form and thereby preserves its anti-competitive character.

CONCLUSION

The majority opinion of the California Supreme Court pays lip service to the constitutional principles applied by this Court to similar blanket restraints upon commercial speech and by the highest court of Maryland in an identical case. But the California Supreme Court has refused to follow those principles and thereby placed itself in conflict with this Court and Maryland's highest court. As a result, petitioners have been deprived of their constitutional right to engage in accurate and truthful commercial speech free of any restraint in the absence of: (1) notice of a specific restraint imposed by statute or regulation; and (2) adequate evidence establishing that restraint is appropriate and necessary in a proceeding where the party whose speech is to be restrained has

had an opportunity to cross-examine and present opposing evidence. The California Supreme Court's assertion of judicial power to *sua sponte* pare down an admittedly unconstitutional restraint to whatever a majority of that court believes is a reasonable limit — without regard for record evidence or the opposition of both parties — is a dangerous precedent which threatens to undermine the free speech protections carefully constructed by this Court.

For each of the reasons stated herein, this Court should grant a petition for certiorari in order to review and reverse the decision of the California Supreme Court.

Dated: November 20, 1992.

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